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No. 82-805

In the

Supreme Court of the United States

October Term, 1982

Lubbock Independent School District, et al., *Petitioners*

v.

Lubbock Civil Liberties Union, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of National Council of Churches of Christ in the United States, the United Presbyterian Church in the United States of America and of the Center for Constitutional Studies in Support of Granting the Writ of Certiorari

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Council of Churches of Christ in the United States of America is the cooperative agency of 32 national Protestant and Eastern Orthodox religious denominations, with an aggregate membership of over 40 million people. The National Council of Churches of Christ is organized exclusively for religious purposes, and it is committed to promoting the application of the law of Christ in every sphere of human relations, including education.

On six successive occasions since the decisions of this Court in *Engel v. Vitale,* 370 U.S. 421 (1962) and in *Abington School District v. Schempp,* 374 U.S. 203 (1963), the National Council of Churches has been instrumental in blocking congressional efforts to overturn this Court's decisions in those cases. For that very reason, this amicus has a vital interest in the correct interpretation of those cases by lower federal and state tribunals, so as not to preclude genuinely voluntary religious association by students outside regular curricular schedule and without state sponsorship or support.

The United Presbyterian Church in the United States of America is a national Christian denomination with churches in all fifty states. It has more than 2,387,000 active members in more than 8,900 congregations, organized into 150 presbyteries and 15 synods. The General Assembly is the highest governing body of the church, meets annually, and is composed of approximately 600 delegates elected by the presbyteries, known as commissioners, one half of whom are ordained ministers; the other half are lay officers known as ruling elders. This brief does not purport to reflect the views of all members of the church, but is based upon policies decided by various General Assemblies.

The Center for Constitutional Studies was established in 1977 by the University of Notre Dame to serve as a research institute and to engage in selected litigation affecting the integrity and autonomy of independent institutions of higher

education, especially church-related colleges or universities. The Advisory Board of this Center is composed of public officials, executives of denominations and religious bodies engaged in education, college administrators, and attorneys knowledgeable in education law. The ecumenical composition of this Board is reflected in the fact that its members are drawn from the following religious groups: Church of Jesus Christ of Latter-Day Saints (Mormon), Jewish, Lutheran, Mennonite, Roman Catholic, Southern Baptist, United Methodist and United Presbyterian.

In 1978 the Center for Constitutional Studies conducted a nationwide survey of the presidents of all church-related colleges and universities in this country. Amici are in a position to report to this Court facts concerning the interpretation that various federal and state officials have placed upon this Court's historical rulings in *Engel, supra,* and *Schempp, supra,* as these officials discharge their obligation to implement the federal and state regulations governing the use of facilities constructed in whole or in part with the financial assistance sustained by this Court in *Tilton v. Richardson,* 403 U.S. 672 (1971) and in *Hunt v. McNair,* 413 U.S. 734 (1973).

As amici argue in the attached brief, they will undoubtedly be affected by the outcome of the instant litigation, but the amici cannot reasonably expect that their interests will be articulated or defended by the parties in this case.

Amici have tried to obtain consent of both parties to participate in this case. The petitioner has granted such consent, but the respondent is not willing to do so. For the foregoing reasons, amici respectfully move this Court for leave to file the attached brief amicus curiae in support of granting the writ of certiorari.

BRIEF AMICUS CURIAE

INTEREST OF AMICI

The primary focus of the research undertaked by the Center for Constitutional Studies has been on church-related higher education.[1] The vast majority of students enrolled in religiously affiliated colleges and universities attended public elementary and secondary schools. For this reason churches and church-related institutions of higher education that are committed to the integration of religion in higher education have an interest generally in the harmonious interrelationship between the values protected by the No-Establishment clause and the Free Exercise clause of the First Amendment, and more particularly in the preservation of a "benevolent neutrality" on the part of public school officials that would permit truly voluntary participation by student in religious studies and in religious speech without governmental sponsorship or control.

In carrying out its research mission, the Center for Constitutional Studies has come to acquire considerable experience with the interpretations by various federal and state officials of this Court's decisions concerning the Religion Clauses of the First Amendment. Like the judgment of the Court of Appeals in this case, these administrative judgments often go far beyond the holdings of this Court, and the Center is in a position to suggest to this Court the impact that the decision of the Court of Appeals, if uncorrected by this Court, could have on religiousy affiliated higher education.

Other interests of the amici are set forth in the accompanying motion for leave to file this brief.

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[1]See e.g., F. Dutile and E. Gaffney, *State and Campus: State Regulation of Religious Affiliated Higher Education* (forthcoming, 1983); E. Gaffney and P. Moots, *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education* (1982); and P. Moots and E. Gaffney, *Church and Campus: Legal Issues in Religiously Affiliated Higher Education* (1979).

SUMMARY OF ARGUMENT

I. By granting review of the judgment in this case, this Court can clarify its teaching concerning the volatile political issue of truly voluntary prayer by students attending public schools.

II. By granting review of the judgment in this case, this Court can reaffirm its teaching concerning the primacy of the value of free exercise of religion in cases of potential conflict with the no-establishment principle, and its teaching that valuable civil rights such as freedom of speech and association are not to be diminished merely because the content of the speech or the goal of the association is religious in character.

III. By granting review of the judgment in this case, this Court can clarify that the historic purpose of the First Amendment Religious Clauses was not to stifle voluntary association for the purpose of engaging in religious activities, but to prevent the government from imposing any sectarian or denominational belief or practice involuntarily upon the people.

ARGUMENT

I. GRANTING CERTIORARI IN THIS CASE WOULD AFFORD THIS COURT AN OPPORTUNITY TO CLARIFY ITS TEACHING CONCERNING THE PERMISSIBILITY OF GENUINELY VOLUNTARY PRAYER.

In his opinion for this Court in *Committee for Public Educational Religious Liberty v. Regan,* 444 U.S. 646, (1980) Justice White wrote that "Establishment Clause cases are not easy; they stir deep feelings. . . ." *id.* at 662. This Court's decisions in *Engel v. Vitale,* 370 U.S. 421 (1962) and in *Abington School District v. Schempp,* 374 U.S. 203 (1963)

have surely been among the cases that have stirred "deep feelings" in the Republic. The impact of these decisions on the American political process has been studied extensively.[2] Much of the initial furor over these two cases was based on a failure to read those decisions carefully, if at all.[3] As a legitimate exercise of its obligation to promote willing acceptance of its decrees by the people, this Court should seize the opportunity afforded it by the instant case to clarify its teaching adumbrated in *Engel* and *Schempp* concerning the permissibility of genuinely voluntary prayer in public buildings, including public school facilities.

The opinion of the Court of Appeals in the instant case is an example of the damage that can be done to valuable constitutional rights if those charged with applying *Engel* and *Schempp* to a variety of factual patterns stray too far beyond the holdings of those cases. This is not to suggest that this

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[2]See, e.g. Beaney and Beiser, "Prayer and Politics: The Impact of Engel and Schempp on the Political Process" 13 J. of Pub. L. 475 (1964) reprinted in T. Becker, ed. *The Impact of Supreme Court Decisions* 20-34 (1969). For other examples of impact studies relating to the *Engel* and *Schempp* decision, see Katz, "Patterns of Compliance with the *Schempp* Decision," 14 J. Pub. L. 396 (1963); Birkby, "The Supreme Court and the Bible: Tennessee Reactions to the *Schempp* Decision" 10 Midwest J. of Pol. Sci. 304 (Aug. 1966); R. Johnson, *The Dynamics of Complaince: Supreme Court Decision-Making From a New Perspective* (1967); Reich, "The Impact of Judicial Decision-Making: The School Prayer Cases," in D. Everson, ed., *The Supreme Court as Policy Maker: Three Studies on the Impact of Judicial Decisions* 44-81 (1968); W. Muir, *Prayer in the Public Schools: Law and Attitude Change* (1967); and K. Dolbeare and P. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (1971).

[3]For an account of the congressional reaction, see Beaney and Beiser, note 2 *supra*. And see 125 Cong. Rec. S 4128-4131 (daily ed., Apr. 5, 1979) (purporting to limit Supreme Court jurisdiction over cases involving "voluntary prayer"), and S 4138-4152 (daily ed., Apr. 9, 1979) (same); Comment, "Section 1252: A Jurisdictional Dinosaur," 75 Northwestern U. L. Rev. 175, 176 (1980), and see Amicus Brief filed by several members of the United States Senate in the instant case.

Court should reverse the decisions announced in those cases. For this Court need not retreat from its holding in *Engel* that the states should refrain from composing prayers for public recitation in the public schools, or from its ruling in *Schempp* that the states should eschew even subtle forms of coerced participation in devotional exercises.

Many constitutional scholars have construed the real significance of this Court's ruling in *Zorach v. Clauson*, 343 U.S. 306 (1952) and *McCollum v. Bd. of Education*, 333 U.S. 203 (1948) as a unified prohibition of employing "the *force* of the public school . . . to promote [religious] instruction." *Zorach, supra* at 315 (emphasis added). See, e.g., Toms and Whitehead, "The Religious Student In Public Education: Resolving a Constitutional Dilemma," 27 Emory L. J. 3 (1978), and literature cited therein. There is no evidence of a "captive audience" in the case at bar. Professor Laurence Tribe suggests that the gist of the offense in *McCollum* was "the combination of material, organizational, and, above all, *symbolic* support for religious instruction," *American Constitutional Law* 825 (1978).

No such support is offered for religious instruction by any of the current policies or practices of the petitioner school board. As the Court of Appeals noted, the current policy of the petitioner reads as follows:

> Insofar as religion is concerned, the Lubbock Independent School District adheres to the principle of freedom of religion as expressed in the Constitution of the United States and the Constitution of the State of Texas. 659 F. 2d 1038, 1038, 1040, n. 5.

The procedures adopted to implement this policy are as follows:

> No school employee shall compose, prescribe, or place his/her approval upon any particular prayer or form of religious activity; however, student initiated and directed religious activities will be permitted.

> The Lubbock Independent School District will allow the teaching about religion through study of the Bible for its literary and historic qualities, or of religion, when presented objectively as part of a secular program of education. *Id.*, n. 6.

Ardent opponents of proposed constitutional amendments relating to school prayer have testified before congressional committees that the crux of the issue is that the State cannot *promote* or *establish* the reading of the Bible or the recitation of prayers. For example, in April of 1964 the well known constitutional scholar, Dr. Leo Pfeffer testified as follows:

> There is not one word in any decision of the Supreme Court including Murray, Engel, Zorach, or McCollum, or any State court decision which can, to any extent, be interpreted as forbidding children to pray or to read the Bible in the public schools. . . . All it says is that the State through its agencies cannot promote or establish the reading of the Bible or recitation of prayers.

Hearings on School Prayer before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee 89th Cong., 2d Sess. 188 (1966). In the 1966 Senate hearings Dr. Pfeffer stated:

> Nothing in any decision of the Supreme Court forbids an individual schoolchild voluntarily to offer a prayer before or after taking of food or perhaps on other occasions, so long as the regular discipline of the school and other children is not thereby disturbed or interfered with.

Id. at 345-346. For similar statements, see *id.* at 215 (statement of Baptist Joint Committee on Public Affairs), at 263 (statement of Department of Social Responsibility, Unitarian Universalist Association), and at 307 (statement of Methodist Bishop Richard Raines). Since the record in the instant case discloses that none of the activity that the petitioners sought to protect was to be sponsored or provided

for by the public school administration, this case presents an opportunity for this Court to clarify that *truly* voluntary prayer is constitutionally permissible.

Such clarification is important not only for the ongoing relationship between this Court and other federal and state tribunals engaged in constitutional adjudication. It would likewise be helpful for the myriad federal and state officials charged with executing a variety of programs of financial assistance. As was stated above, the work of the Center for Constitutional Studies is frequently focused on legal issues facing religiously affiliated colleges and universities. In this work the Center has seen administrative interpretations of the constitution purporting to be grounded in this Court's decisions but ranging far beyond their holdings.

As part of a study of the impact of federal regulation on religiously affiliated colleges and universities, the Center for Constitutional Studies conducted an extensive survey of the chief administrators of these institutions in 1978.[4] One of the results of this study is that the college administrators participating in the study rarely complained of federal regulation as excessively burdensome. A notable exception to this finding was the frequent complaint that strained interpretations concerning the use of federally funded facilities for any sort of religious purpose (e.g., sacred music courses) constituted governmental interference. This study disclosed several instances of administrative hostility toward religion on campuses. By granting certiorari in this case, this Court could clarify for administrative officials that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

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[4]The results of this study were published by the University of Notre Dame Press in 1982 under the title *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education.*

II. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY ITS TEACHING CONCERNING THE PRIMACY OF THE FREE EXERCISE CLAUSE IN CASES OF POTENTIAL CONFLICT WITH THE NO-ESTABLISHMENT PRINCIPLE AND ITS TEACHING CONCERNING THE RELATIONSHIP BETWEEN THE RELIGION CLAUSES AND OTHER IMPORTANT VALUES PROTECTED BY THE FIRST AMENDMENT.

A. THE PRIMACY OF FREE EXERCISE OF RELIGION

This Court has ruled that the government may not burden legitimate claims of free exercise of religion unless it has a truly compelling justification for doing so, and unless it has done so in a manner that places the least restrictive burden upon the exercise of religious freedom. *Sherbert v. Verner*, 374 U.S. 398 (1963). The relationship between the free exercise interest protected in *Sherbert* and in cases similar to it, e.g., *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707 (1981), *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and the no-establishment principle asserted in *Everson v. Bd. of Education*, 330 U.S. 1 (1947) and its progeny has never been clarified in a hard and fast ruling of this Court, but has been left to case by case adjudication. Analysis of the body of Church-State law that has developed since *Everson*, however, discloses that this Court has repeatedly affirmed that free exercise values are significant and need breathing space. This Court has never taught that legitimate free exercise claims may easily be defeated by engaging in a balancing of interests in which the no-establishment principle would always be the dominant concern.

Some courts, including the Court of Appeals in the instant case, have assumed that any reasonable accommodation of

religious beliefs and practices would itself constitute an impermissible establishment of religion. See, e.g., *Brandon v. Bd. of Education,* 635 F.2d 971, 978-79 (2d Cir. 1980); *Thomas v. Review Bd. of Indiana Employment Security Division,* 391 N.E. 2d 1127 (Ind. 1979). This Court corrected that error by reversing *Thomas,* 450 U.S. 707, but left standing this view in *Brandon,* cert. denied, 102 S. Ct. 970 (1981), reh. denied, 102 S. Ct. 1493 (1982). As a result, lower courts have felt free to indulge an absolutist interpretation of one value protected in the First Amendment, the no-establishment principle, that reduces the other value protected in the same text, the free exercise principle, to a nullity. It is just such an expansive reading of one clause as clashing with the other that this Court repudiated in *Walz v. Tax Commission,* 397 U.S. 664, 668-69 (1970). See also *Sherbert,* supra at 415-16 (Stewart, J., concurring) ("the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief"). To turn aside the free exercise claim presented by the petitioners on the basis of the conjecture or the worry that allowing students to pray together voluntarily might result in an impermissible establishment of religion merely demonstrates how far some courts have moved away from the balance struck in favor of free exercise values in *Sherbert, Yoder,* and *Thomas.*

It must be stressed that the petitioner's policies do not affect infants, but mature students. The Court of Appeals attempted to distinguish the instant case from the contrary holding in *Widmar v. Vincent,* 454 U.S. 263 (1981), and in *Keegan v. University of Delaware,* 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976), on the ground that college freshmen should enjoy significantly greater First Amendment protection than should a high school senior. 669 F.2d at 1043. This view is flawed for several reasons. First, the majority of our citizens complete their formal education and training in high school. Second, the process of maturation is developmental and does not occur magically upon the awarding of a

high school diploma or upon matriculation in a postsecondary institution. One of the reasons why churches in this country have engaged for centuries in an educational mission is to stress that religious studies form an integral part of a liberal education.[5] If, as amici maintain, college students are to be encouraged to pursue such studies and to observe the practices connected with their voluntarily embraced religious commitments, this policy cannot be fostered by stifling the development of religious sensitivities among students immediately before they go to college. Hence, if a court tolls the bell for the right of voluntary religious expression on behalf of high school seniors, amici perceive it as tolling as well for the same freedom that should be enjoyed by college freshmen. It is a gross misunderstanding of the level of their maturity to treat in a paternalistic fashion all of the students whose free speech and associational rights are protected by the current policies and practices of the petitioner, as though all these students were infants incapable of any intelligent, truly voluntary decision-making.

The Court of Appeals completely overlooked the leading decision of this Court concerning the First Amendment rights of public school students, *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1959). Perhaps this omission was due to the reliance by the Court of Appeals on the decision of the Court of Appeals for the Second Circuit in *Brandon.* The *Brandon* court misconstrued *Tinker* to be

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[5]See, e.g., J. Mosely, ed., *Church and College: A Vital Partnership* 4 vols. (1980); B. Fisher, ed. *New Pathways: A Dialogue in Christian Higher Education* (1980); J. Westerhoff, ed., *The Church's Ministry in Higher Education* (1978); R. Parsonage, ed., *Church Related Higher Education: Perceptions and Perspectives* (1978); E. Carlson, *The Future of Church-Related Higher Education* (1977); R. Baepler and A. Olsen, eds., *The Church-Related College in an Age of Pluralism: The Quest for a Viable Saga* (1977); National Commission on United Methodist Higher Education, *A College-Related Church: United Methodist Perspectives* (1976) and *Endangered Service: Independent Colleges, Public Policy and the First Amendment* (1976); and J. Newman, *The Idea of a University* (Image Book ed. 1959).

limited to *political* speech, asserting that "sensitive Establishment Clause considerations limit their right to air *religious* doctrines." 635 F.2d at 980 (emphasis supplied). *Tinker* may not be read in such a strained, wooden fashion, for although the wearing of a black armband by John Tinker and his companions in the context of a protest to this country's participation in the Vietnam conflict had clear overtones of political protest, the record in *Tinker* makes clear that the meaning of this act as well as its motivation was explicitly religious.[6] Nothing in *Tinker* justifies the decision of the *Brandon* court that the government must allow on public school property sundry forms of political speech, but may ban the voluntary meeting of mature students for purposes of engaging in speech the content of which is religious. By granting certiorari in this case, this Court could reaffirm its teaching concerning the primacy of free exercise values in cases of potential conflict with the no-establishment principle.[7] And this Court could likewise reassert that

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[6]The father of John Tinker is a Methodist minister who was at the time of the act challenged in the lawsuit working for the American Friends Service Committee, an organization founded by Quakers to oppose war and to help solve social problems in a friendly spirit. A. Ginger, *The Law, the Supreme Court and the People's Rights* 200 (1973). The wearing of the armband, coupled with voluntary fasting on two days during the Advent and Christmas season, was a religious act of mourning for the war dead. Even if the acts engaged in by the students had not been so explicitly linked to a traditional religion, these acts were surely within the expansive definition of religion adopted by this Court in the draft cases arising in this period, *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163, 187 (1965).

[7]See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 619-641 (1978) (Brennan, J., concurring). And see Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673 (1980); Fink, "The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values," 27 Cath. U. L. Rev. 207 (1978); Pfeffer, "The Supremacy of Free Exercise," 61 Georgetown L.J. 1115 (1973); and Gianella, "Religious Liberty, Non-Establishment, and Doctrinal Development." 80 Harv. L. Rev. 1381, 1389 (1967).

students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker, supra,* at 506.

B. THE RELATIONSHIP BETWEEN THE RELIGION CLAUSES AND OTHER FREEDOMS PROTECTED BY THE FIRST AMENDMENT

Not only is the result reached by the Court of Appeals not required by *Tinker;* it militates against the whole corpus of free speech doctrine elaborated by this Court, for the "government has no power to restrict expression because of its message, its idea, its subject matter, or its content. . . ." *Police Dept. of City of Chicago v. Mosely* 408 U.S. 92, 95-96 (1972). See also *Poulos v. New Hampshire,* 345 U.S. 395 (1953); *Fowler v. Rhode Island,* 345 U.S. 67 (1953); *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Kunz v. New York,* 334 U.S. 558 (1948), and *Tucker v. Texas,* 326 U.S. 517 (1946). As Justice Brennan has stated: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel v. Paty,* 435 U.S. 618, 641 (Brennan, J., concurring). See also L. Tribe, *American Constitutional Law,* 1979 supp. at 78-79 ("government may not constitutionally use religion as a basis for burdensome classifications"). When, as here, a public school district makes its facilities available to a wide variety of groups wishing to use them for their meetings during off-school hours, but is enjoined from granting such access only to a voluntary association wishing to use the facility to engage in religious speech, the court has created a content-based restraint which unduly burdens the expression and communication of ideas. See L. Tribe, *American Constitutional Law* 580-582 (1978).

The Court of Appeals did not address the claim of the petitioner that the action of the school board protects the rights of students to freedom of association. The desire to

gather together into groups is a typically American practice. As Alexis de Tocqueville observed over a century ago:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them.

A. de Tocqueville, I *Democracy in America* 196 (P. Bradley, ed. 1945).[8]

Although there are no decisions of this Court squarely holding that a voluntary association of students seeking to pray together is protected by freedom of association, it would not constitute a leap from from this Court's precedents to grant to mature students under the circumstances of the instant case the kind of constitutional protection afforded to civil rights groups, *NAACP v. Alabama ex. rel. Patterson,* 357 U.S. 449 (1958), political parties, *Buckley v. Valeo,* 424 U.S. 1 (1976), labor organizations, *United Transportation Union v. Michigan,* 401 U.S. 576 (1971), banks and other for-profit corporations, *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), and religious bodies, *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952). To fail to extend to students protected by the policies of the petitioner in the instant case the constitutional protection extended to the on-campus activities of Students for a Democratic Society, *Healy v. James,* 408 U.S. 169 (1972), or to students seeking official recognition of a gay rights organization, *Gay Lib v. University of Missouri,* 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080, reh. denied, 435 U.S. 981 (1978), would be doubly ironic in that the current policies and procedures of the

[8]See Raggi, "An Independent Right to Freedom of Association," 12 Harv Civ. Rts-Civ. Lib. L. Rev. 1 (1977). And see Gaffney, "The Constitution and the Campus: The Case for Institutional Integrity and the Need for Critical Self-Evaluation," in J. Mosely, ed. *3 Church and College: A Vital Partnership* 54-56, 60-62 (1980); Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1 (1974); Rice, "The Constitutional Right of Association" 16 Hastings L.J. 491 (1965); C. Rice, *Freedom of Association* (1962).

petitioner do not grant official recognition, approval, or support for any activities allowed to occur on public school property. The associational rights of these students should be protected no less than those of other student groups organized for legitimate ends, *McDaniel v. Paty, supra* at 641 (Brennan, J., concurring); and among these rights should be equal access to public facilities on a neutral and non-discriminatory basis.

By granting certiorari in this case, the Court could reassert its teaching that a state may not unduly burden the free speech rights and the associational rights of students merely because the content of their speech and the purpose of their voluntary association is religious in character.

III. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY THAT THE HISTORIC PURPOSE OF THE FIRST AMENDMENT RELIGION CLAUSES WAS NOT TO STIFLE VOLUNTARY ASSOCIATION FOR THE PURPOSE OF ENGAGING IN RELIGIOUS ACTIVITIES, BUT TO KEEP THE GOVERNMENT FROM IMPOSING ANY SECTARIAN OR DENOMINATIONAL BELIEF OR PRACTICE INVOLUNTARILY UPON THE PEOPLE.

Whether this Court should engage in the writing of legal history in its opinions is itself a debatable matter.[9] Justice Brennan, for example, has expressed the view that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." *Schempp,* 374 U.S. at 234 (Brennan, J., concurring). This view does not preclude the writing of legal history by this Court; indeed the view was expressed within Justice Brennan's most expansive attempt to account for the history underlying the Religion Clauses.

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[9]See, e.g., C. Miller, *The Supreme Court and the Uses of History* (1969); and literature cited therein; and R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982).

If judges reviewing cases involving the Religion Clauses prefer to resolve such cases by reference to history, they should be aware of the complexity of the historical aims of the Founding Fathers. It is plainly insufficient to invoke the past vaguely or erroneously as the rationale for an inadequate resolution of a concrete contemporary problem.

The Court of Appeals in the instant case did not refer at all to the original intention or meaning of the Religion Clauses. The *Brandon* court on which the *Lubbock* panel relied, however, did attempt an essay in legal history that adopted the oversimplified view that there were simply three different reasons for erecting a high and impregnable wall of separation of church and state. A more serious attempt to account for the history underlying the Religion Clauses than that produced by the *Brandon* court would, in fact, undergird a conclusion opposite from that reached in *Brandon* and *Lubbock*. A simplistic version of the past should not be allowed to stand as a rationale for excluding religionists from the protection of freedom of speech and association or for denigrating a free exercise claim. In any event, the conjecture that accommodation of that interest would impermissibly establish religion is highly dubious as a matter of history.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to

> flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect.

M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 9, 15 (1978). In particular, the discriminatory denial of the use of public facilities to voluntary associations who gather for a religious purpose cannot be justified by a vague reference to James Madison, for the views of the floor manager of the First Amendment were not those espoused by the Court of Appeals. For example, the first text that Madison proposed to the Congress read as follows: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of Congress* 434 (June 8, 1789). It was Madison, moreover, who endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter of Madison to M. L. Hurlbert, May, 1830, in G. Hunt, ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the petitioners. For the members of the First Congress, including Madison, appropriated funds for the construction of facilities in federal territories that were explicitly to include religious instruction among their purposes. See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964).

Madison also suggested that the meaning of the Establishment Clause is to be ascertained from considering the "true sense in which it was adopted by the states." This sense is reflected, for example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over

another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833). In this view, the Religion Clauses were designed to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of withdrawing the power of the Federal Government to aid religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious groups." C. Antieau, A. Downey, and E. Roberts, *Freedom From Federal Establishment* 160 (1964). If legal history is to be employed in the resolution of Establishment Clause cases such as the case at bar, those who do so should be more aware of the complexity of that history than is manifest in the version of history adopted by the *Brandon* court followed by the Court of Appeals in the instant case.

As Professor Tribe has stated, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers — or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978). By granting certiorari in this case, the Court could clarify that the historic purpose of the Religion Clauses was not to stifle voluntary association for the purpose of engaging in religious activities, but to keep the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

CONCLUSION

For the reasons stated above, amici urge that a writ of certiorari should issue in this case and that this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

State of Indiana)
) ss.:
St. Joseph County)

On this _____ day of December, 1982, before me, a Notary Public for the State of Indiana and St. Joseph County, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the Motion for Leave to File a Brief Amicus Curiae and the Brief Amicus Curiae of the National Council of Churches of Christ in the United States and of the Center for Constitutional Studies in support of granting the writ of certiorari to the following attorneys:

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_____

EDWARD MCGLYNN GAFFNEY, JR.

Sworn to and Subscribed before me
the day and year aforesaid.

_____

Rosemary K. Reiter, Notary Public